No. 42925-0-II
Consolidated into No. 41201-2-II

COURT OF APPEALS, DIVISION TWO
OF THE STATE OF WASHINGTON

DALE E. and LETA L. ANDERSON; DALE E. ANDERSON and LETA L. ANDERSON, TRUSTEES OF THE DALE E. ANDERSON AND LETA L. ANDERSON FAMILY TRUST; and RIVER PROPERTY, LLC,

Respondents/Cross-Appellants,

v.

JAMES W. BROWN; ROBERTA D. DAVIS; KAE HOWARD, TRUSTEE OF THE KAE HOWARD TRUST; MICHAEL J. and CRISTI D. DEFREES; TUAN TRAN and KATHY HOANG; VINCENT and SHELLY HUFFSTUTTER; THOMAS J. and GLORIA S. KINGZETT; LARRY R. and SUSAN I. MACKIN; TOD E. MCCLASKEY, JR. and VERONICA A. MCCLASKEY, TRUSTEES OF THE MCCLASKEY FAMILY TRUST—FUND; CRAIG STEIN, RICHARD AND CAROL TERRELL,

Appellants/Cross-Respondents.

pm 6/11/12

OPENING BRIEF OF RESPONDENTS/CROSS-APPELLANTS

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I. INTRODUCTION

This appeal is governed by the Land Use Petition Act ("LUPA"), chapter 36.70C RCW. Appellants seek review of the City of Vancouver's ("City") approval of Respondents', Dale and Leta Anderson ("Andersons"), application to subdivide their 49,912 square foot lot into two lots ("Anderson Short Plat"). There is no dispute that the Anderson Short Plat satisfies all applicable zoning standards.

Appellants own lots in the same subdivision as Andersons. Because of that, Appellants contend that state law gives them the right to veto the Anderson Short Plat even though it complies with all applicable zoning requirements. Appellants base their argument on RCW 58.17.215 which requires the majority consent of those that have an interest in a plat being altered.

Appellants interpretation is contrary the legislative intent as conveyed by the entire statute, as well as the common understanding of predecessor statutes, and accepted common law principles. Appellants' argument also undermines clear legislative pronouncements encouraging greater density in urban growth areas. For these reasons, the Court should reject Appellants overly expansive interpretation of the state subdivision statute and affirm the decision of the City of Vancouver Hearing Examiner.

II. STANDARD OF REVIEW

This appeal of a final land use decision is governed by the Land Use Petition Act ("LUPA"), chapter 36.70C RCW. LUPA reflects "a clear legislative intention that this court give substantial deference to both legal and factual determinations of local jurisdictions with expertise in land use regulation"—in this case the decision of the City Hearing Examiner. *Timberlake Christian Fellowship v. King County,* 114 Wn. App. 174, 180, 61 P.3d 332 (2002), *review denied sub nom., Citizens for a Responsible Rural Area Dev. v. King County,* 149 Wn.2d 1013, 69 P.3d 875 (2003). The Court of Appeals may only consider the record before the City Hearing Examiner. Appellants carry the burden of establishing that the City Hearing Examiners' decision violated one of the enumerated standards in RCW 36.70C.130.

Appellants challenge the decision under two of the six standards: (1) the error of law standard; and (2) the clearly erroneous standard. RCW 36.70C.130(1)(b), (d). Appellants properly state that errors of law are reviewed de novo, but omit that LUPA requires that the court give deference as is due to the local jurisdiction's expertise. RCW 36.70C.130(1)(b); *Habitat Watch v. Skagit County*, 155 Wn.2d 397, 412, 120 P.3d 56 (2005). Deference is due to the construction of a local

ordinance by the agency charged with enforcing the ordinance. *Asche v. Bloomquist,* 132 Wn. App. 784, 797, 133 P.3d 475 (2006).

The clearly erroneous standard of review is also deferential. *Schofield v. Spokane County,* 96 Wash.App. 581, 586, 980 P.2d 277 (1999). The reviewing court may find a decision clearly erroneous only when it is left with the definite and firm conviction that the Hearing Examiner made a mistake. *Id.* When determining whether a decision is clearly erroneous, the court applies the law to the facts giving deference to the Hearing Examiner's factual findings. *Citizens to Preserve Pioneer Park LLC v. City of Mercer Island*, 106 Wn.App. 461, 474, 24 P.3d 1079 (2001).

Notably, Appellants do not challenge any of the Hearing Examiner's findings of fact as unsupported by substantial evidence. *See* RCW 36.70C.130(1)(c). Therefore, the Hearing Examiners factual findings are verities for purposes of the appeal. *N. Pac. Conf. Ass'n of Seventh-Day Adventists v. Clark County*, 118 Wn. App. 22, 28, 74 P.3d 140 (2003) (citing *United Dev. Corp. v. City of Mill Creek*, 106 Wn. App 681, 688, 26 P.3d 943 (2001)).

III. COUNTER-STATEMENT OF THE CASE

A. Regulatory Background

The division of land is governed by the state subdivision statute. *See generally*, chapter 58.17 RCW. State law differentiates between subdivision and short subdivisions, the latter (also referred to as a short plat) is defined as the "division or redivision of land into four or few lots, tracts, parcels, sites, or divisions for the purpose of sale, lease, or transfer of ownership." RCW 58.17.020(6). The proposed division of land is mapped on a document commonly referred to as a plat. The plat denotes the location of lots, tracts, easements and roadways, among other things, and is recorded with the auditor in the county where the property is situated once it has been approved by the proper agencies. *See generally* 17 Wash. Pract. §. 5.1.

State law delegates the regulation of short subdivisions to local jurisdictions. RCW 58.17.030;. -.060 (directing local jurisdiction to adopt regulations governing short subdivisions). Thus, subdivisions must comply with chapter 58.17, while short subdivisions need only comply with local regulations adopted pursuant to RCW 58.17.060. The only restriction placed upon local jurisdictions with respect to short plats procedures is that any alteration or vacation involving a public dedication must by process in accordance with RCW 58.17.212 and 58.17.215.

Consistent with state law, the City of Vancouver adopted regulations governing short subdivisions. *See generally* Vancouver Municipal Code ("VMC"), Chapter 23.20. The City incorporated the plat alteration provisions in RCW 58.17.215. VMC § 20.320.080(D).

B. The Original Subdivision[1]

The Andersons and Appellants all own lots created by the Plat of Rivershore-Phase 1 ("Plat of Rivershore"). Clerk's Papers ("CP) at 374 (Finding 3). The Plat of Rivershore was recorded in July of 1989 and created 13 individual lots. *Id.* (Finding 2). In addition to 13 lots, the Plat of Rivershore created a tract of tidelands extending along the length of the upland boundary of the 13 lots. A set of Covenants, Conditions and Restrictions ("CC&Rs") recorded with the Plat of Rivershore states that Tract A is to be owned and maintained by the owners of lots 1-13 and will be conveyed an undivided 1/13 interest in Tract A.[2] CP at 374 (Finding 4).

At the time of recording, the Plat of Rivershore was located in unincorporated Clark County. CP at 374 (Finding 2). In 1997, the Plat of Rivershore was annexed to the City of Vancouver. *Id.*

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[1] Because Appellants do not challenge and of the Hearing Examiners factual findings Respondents cite the Hearing Examiners decision for this factual background.

[2] The ownership of Tract is also recited on a note on the Plat of Rivershore. CP at 379 (Finding 33).

C. The Anderson Property and Zoning Regulations

Like the other original lots in the Plat of Rivershore, the Anderson Property is approximately one acre in size (+/- 42,747 square feet) and developed with a single-family residence. CP at 474 (Finding 1). The City's development regulations zone the Anderson Property (as well as the other lots in the plat of Rivershore) as R-4 a low density residential zone. *Id.* The R-4 zone has minimum lot size of 10,000 square feet. The minimum lot size may be further reduced to 8,000 square feet if Tier I infill standards are met. The City of Vancouver's development regulations allow for lots that are much smaller than the 40,000 plus square feet in most of the original lots in the Plat of Rivershore.

D. The Anderson Short Plat Application

In September of 2008, the Andersons applied to subdivide their Lot 2 into two lots. CP at 374 (Findings 1 & 3). Appellants opposed the subdivision. *Id* (Finding 3). Appellants asserted that the short subdivision would dilute the 1/13th interest the original lot owners had in Tract A. Therefore, Appellants argued that the application had to be processed as a plat alteration under RCW 58.17.215.

In response to Appellants' opposition, the City Attorney issued a letter opinion. The letter opinion concluded that the Anderson Short Plat must be processed as a plat alteration. CP at 374 (Finding 3). Notably,

the City Attorney's letter opinion concluded that the plat alteration procedures were not required simply because a previously platted lot is being divided as Appellants argue here:

> [B]ased on this analysis . . . we conclude that if a short plat proposal is nothing more than a lot division, and is consistent with the plat in all other respects, no plat alteration approval is required.

AR Sec. 8, Rec. 59 at 2. Rather, the City Attorney felt that the Anderson Short Plat was inconsistent with the CC&Rs that had been filed contemporaneously with the Plat of Rivershore. *Id.* at 2-3. In sum, the City Attorney agreed with Appellants that the proposed subdivision would dilute the ownership of the tidelands and alter a common benefit held by the other lot owners. Since, under the City Attorney's view, the proposal would dilute the undivided ownership of the tidelands established in the plat, the proposal had to be processed as a plat alteration and was subject to the approval of the majority of the lot owners.

E. Contemporaneous Civil Litigation

In light of the City Attorney's opinion, the Andersons filed a declaratory judgment suit in Clark County Superior Court. CP at 375 (Finding 6). Specifically, the Andersons asked the Court to determine that the redivision of a lot was not prohibited by the Plat of Rivershore or the Rivershore CC&Rs as the City Attorney had opined. *Id.* In a written

Order dated April 8, 2010, the Clark County Superior Court, the Honorable Judge Nichols presiding, concluded that:

> The original covenants, recorded under Clark County Auditor's Number 8905300158, . . . and the subdivision plat of Rivershore, do not address the further subdivision of any lot in Rivershore.

Id. The Court noted that its decision should have no bearing on the City's determination as to whether the short plat application met the applicable criteria for approval of the short plat under the City's zoning code. *Id.*

Appellants appealed the decision to the Court of Appeals, Division II. That appeal was ultimately consolidated with this appeal.

F. As a Result of the Clark County Court's Ruling, the City Attorney Concluded That the Anderson Application Could Be Processed as a Short Plat Because It Did Not Violate the Plat Condition or the Rivershore CC&Rs

On September 23, 2010, the City Attorney issued a new opinion in light of the Court's ruling. CP at 375 (Finding 7). The City Attorney concluded that the Andersons' subdivision application could be processed as a short subdivision without having to follow the procedures for a plat alteration. *Id.* The Andersons submitted the short plat application to create a new lot (identified as Lot 2-1) consisting of approximately 8,941 square feet. The City administratively approved the Anderson Short Plat on April 6, 2010. CP at 375 (Finding 7). Appellants filed an administrative appeal with the City Hearing Examiner. *Id.* (Finding 8).

G. Appeal and the City of Vancouver Hearing Examiner's Decision and Subsequent LUPA Appeal.

Appellants made four arguments on appeal before the City of Vancouver Hearing Examiner ("Hearing Examiner"):

(1) the proposal should have been processed as a plat alteration;

(2) the short plat required a substantial development permit under the Shoreline Management Act, chapter 90.58 RCW;

(3) the short plat did not comply the infill development standards; and

(4) the short plat did not satisfy the approval criteria.

CP at 371-372. After considering the position of parties, the Hearing Examiner denied the appeal in a 14-page decision and affirmed the City's approval of the Anderson Short Plat. CP at 384.

The Hearing Examiner concluded that the plat alteration procedures do not apply unless the proposal alters a communal interest:

> Reading the application city and state provisions together as a whole, it appears that short plats and plat alterations are separate, distinct procedures. Having been asked to interpret these provisions for the City, the instant reviewing body concludes that plat alteration is not triggered by a short plat application when the short plat does not propose alteration to public dedications or

other interest held commonly amongst
multiple lots of the parent plat.

(CP at 382). The Hearing Examiner expressly found that the Anderson Short Plat did not alter the undivided 1/13th interest in Tract A. *Id.* Appellants do not challenge that finding.

Appellants filed a petition for review of the Hearing Examiner's decision with the Clark County Superior Court pursuant to LUPA. CP at 338. Of the four issues raised before the Hearing Examiner (identified above), Appellants only assigned error to the Hearing Examiner's decision on issues 1, 3 and 4. CP at 341. The Clark County Superior Court concluded that Appellants had failed to carry their burden of proof and denied the appeal. CP at 1701-1703. Appellants filed this appeal. CP at 1704-1705.

Of the four issues raised before the Hearing Examiner, Appellants only challenge the Hearing Examiner conclusion that the Anderson Short Plat was not a plat alteration within the meaning of the Vancouver Municipal Code. *See generally* Appellants' Opening Brief. Appellants have abandoned the others issues and therefore, the Hearing Examiner's findings and conclusions with respect to those issues are final.

IV. ARGUMENT

A. The Hearing Examiner Correctly Concluded That the Anderson Short Plat Was Not a Subdivision Alteration Within the Meaning of RCW 58.17.215 and VMC 20.320.080(D) and Did Not Require the Appellants' Majority Consensus.

The Hearing Examiner correctly interpreted and applied the Vancouver Municipal Code and state law when it concluded that the subdivision alteration procedures only apply to proposals that alter communal rights conveyed in a subdivision. The Anderson Short Plat divides their privately-owned property; it does not seek to alter any communal right held by other owners of lots in the subdivision. Nevertheless, Appellants contend that RCW 58.17.215 requires their majority approval. Appellants' argument is contrary to the plain meaning of RCW 58.17.215, illogical and would undermine strong state law polices favoring increased urban density within city limits.

1. The Plat Alteration Procedures Do Not Apply to the Redivision Lots.

The fundamental objective of any statutory construction inquiry is "'to ascertain and carry out the intent of the Legislature.'" *HomeStreet Bank, Inc. v. Dep't of Rev.*, 166 Wn.2d 444, 451, 210 P.3d 297 (quoting *Rozner v. City of Bellevue*, 116 Wash.2d 342, 347, 804 P.2d 24 (1991)). Where statutory language is plain and unambiguous, a statute's meaning must be derived from the wording of the statute itself. *Human Rights*

Comm'n v. Cheney Sch. Dist. No. 30, 97 Wash.2d 118, 121, 641 P.2d 163 (1982). A statute must be construed not strictly according to its letter, but according to its intent as gathered from all parts of the act. *Alderwood Water Dist. v. Pope & Talbot*, 62 Wn.2d 319, 382 P.2d 639 (1963). Similarly, it is the duty of the court to adopt a construction that is reasonable and in furtherance of the obvious and manifest purpose of the legislation. *Wilson v. Lund*, 74 Wn.2d 945, 947-948, 447 P.2d 718 (1968). Thus, the plain meaning of a statute is discerned from all that the "Legislature has said in the statute and related statutes that disclose legislative intent about the provision in question." *Five Corners Family Farmers v. State,* 173 Wn.2d 296, 305, 268 P.3d 892 (quoting *Dep't of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 11, 43 P.3d 4 (2002)).

Appellants urge the court to adopt an overly broad interpretation of RCW 58.17.215. The section requires the "signatures of the majority of those persons having an ownership interest of lots, tracts, parcels, sites, or divisions in the subject subdivision or portion to be altered" before an applicant may alter a subdivision *Id.* Respondents agree that what constitutes an alteration has not been decided by this, or any other Washington State Appellate Court. Respondents do not agree, however, that the provision should be viewed in a statutory vacuum as Appellants' conclusion requires.

Prior to 1987, Washington addressed the vacation of plats and plat amendments in former chapters 58.11 RCW (vacations) and 58.12 RCW (amendments). In 1987, the Legislatures repealed the chapters and replaced them with new sections in chapter 58.17 RCW. 1987 Wash Laws. Ch 354 §§ 3, 4, and 7 (codified at 58.17.212; .-215; .-217).

Present day RCW 58.17.215 was preceded by a similar provision in RCW 58.12.010 (repealed). The repealed provision required a three-fourths majority of ownership to approve a subdivision alteration. Although the essential language is largely the same as existing RCW 58.17.215, the Washington Attorney General concluded that the redivision of a lot, without more, was not a plat alteration under the predecessor to RCW 58.17.215. Washington Attorney General Letter Opinion ("AGLO"), No. 12 (March 14, 1980).

Citing an earlier AGLO, the Attorney General reaffirmed that the plat alteration statute did not apply to the creation of a new subdivision within an existing one:

> [T]he provisions of chapter 58.12 are, in any event, . . . only pertinent in those instances in which the alteration is being initiated by property owners within the subdivision involved and amounts to something other than simply the creation of a new, smaller, subdivision through the process of dividing a single lot within an existing subdivision.

AGLO No. 12 March 14, 1980 (emphasis added) (internal quotations omitted). "Although not controlling, attorney general opinions are entitled to great weight." *Thurston County v. City of Olympia*, 151 Wn.2d 171, 177, 86 P.3d 151 (2004).

Appellants acknowledge that RCW 58.12.020 preceded RCW 58.17.215. Appellants' Opening Brief at 9. Nevertheless, Appellants attempt to discount the weight of the AGLO because RCW 58.12.020 was permissive whereas RCW 58.17.215 is mandatory. Appellants' reasoning is unavailing.

The question prompting the AGLO was whether it was legally necessary for a "person owning lots within an existing subdivision who desires further to divide that lot or lots to: . . . (b) Alter the plat pursuant to chapter 58.12." AGLO No. 12, March 14 1980. In answering the question, the AGLO cites the permissive nature of RCW 58.12.020 as *one* reason to answer the question in the negative. The AGLO goes on to provide a *second* reason: that the plat alteration provisions do not apply to the division of a single lot within an existing subdivision. The two reasons were mutually exclusive and the AGLO's conclusion did not rely *solely* on the permissive nature of chapter 58.12.

Appellants' argument focused on one sentence in RCW 58.17.215. But, the remainder of that section affirms that the Legislature sought to

protect communal rights. The legislative intent to protect communal property is further affirmed in the subsequent sentence where the Legislature addresses proposals that would violate restrictive covenants. While covenants do not create ownership interests, they do impose restrictions that provide a common benefit to other lot owners in a common plat. In fact, requiring the consent of a majority of "those persons having an ownership interest" suggests that the Legislature intended to provide additional procedural protections for proposals that would alter property that benefits or is owned by multiple parties, such as easements, open space tracts, and roadways.

Likewise, other provisions in chapter 58.17 RCW demonstrate that the Legislature did not intent to include the division of a single, privately-owned lot in an existing subdivision within the scope of the plat alteration procedures. For instance, RCW 58.17.060, which was adopted at the same time as RCW 58.17.215 clarifies that the plat alteration procedures were only directed at proposals that would alter a communal right or privilege:

> When an alteration or vacation involves a public dedication, the alteration or vacation shall be processed as provided in RCW 58.17.212 or 58.17.215.

RCW 58.17.060 (emphasis added).

Changing the facts of this case illustrates the intended application of RCW 58.17.215. The Plat of Rivershore established a tract consisting entirely of tidelands. Each owner of the upland lots, including the Andersons, has an undivided 1/13 interest in the tideland tract. It is undisputed that the Anderson Short Plat does not change the dimension or ownership of Tract A. However, had the Andersons sought to extend the boundaries of their lot to encompass all or a portion of Tract A, the communal rights of the other lot owners would have been altered and the Andersons would not be permitted to proceed without a majority consensus under RCW 58.17.215. That, of course, is not the case here.

2. Appellants' Construction of RCW 58.17.215 Creates a Legislatively Imposed Covenant Against Further Subdivision Contrary to Established Washington Law

Washington law does not favor implicit restrictions on the free use of land and certainly does not interpret plats to create an implied restriction against further subdivision. *Bersos v. Cape George Colony Club*, 4 Wn. App. 633, 666, 438 P.2d 644 (1971). Nevertheless, Appellants argue that RCW 58.17.215 creates a de facto land use restriction against further subdivision. Under Appellants theory, the Andersons may not further subdivide their land unless they receive a majority of Appellants' consent. Appellants concede that they will not consent to the Anderson Short Plat. CP at 376 (Finding 11). Thus

accepting Appellants' argument creates an implied covenant against the further subdivision of land.

3. Appellants' Interpretation Would Subject Growth Management Act Planning Goals and Local Zoning to the Whim of a Majority of Lot Owners in a Given Plat

Legislative intent is also derived from what the Legislature has said in related statutes. *Five Corners Family Farmers v. State,* 173 Wn.2d at 305. The state subdivision statute and the Growth Management Act are both aimed at promoting the effective use and orderly development of land. *Compare* RCW 58.17.010 *with* RCW 36.70A.010. More specifically, the state subdivision statute was adopted to prevent overcrowding of land and lessen congestion by requiring the orderly development of land. RCW 58.17.010. The Growth Management Act, chapter 36.70A RCW, seeks to achieve many of the same goals by requiring that local jurisdiction plan for and direct growth to urban growth areas.

Appellants' interpretation of RCW 58.17.215 would subject clear legislative directives requiring greater urban density to the whimsical vote of a majority of lot owners in a subdivision. The GMA requires that cities, like the City of Vancouver, increase density in their urban growth areas. RCW 36.70A.110. Construing RCW 58.17.215 to require Appellants majority consensus before an applicant could subdivide a lot in a pre-

existing lot would undermine the GMA's goals to increase density in the urban growth area.

The facts in this case illustrate the consequences of reading RCW 58.17.215 too broadly. Consistent with GMA requirements the City zoned the Anderson Property R-4 which has a minimum lot size of 10,000 square feet or 8,000 square feet when infill criteria are met. The pre-divided Anderson lot is approximately 47,000 square feet—more than four times the density the City is attempting to achieve in the particular zone pursuant to the GMA. Accepting Appellants' argument that the subdivision alteration applies to the re-division of a lot in an existing plat would subject GMA planning goals to the whim of a majority vote and undermine state planning goals.

B. Even if the Court Were to Conclude That the Re-division of a Platted Lot Is a Subdivision Alteration, Which It Should Not, the Error Is Harmless

Even if the Court were to conclude that the re-division of a platted lot must adhere to the subdivision alteration provisions, which it should not, the error is harmless. The subdivision alteration provision only requires that the signatures of the majority of persons having an ownership interest in the subdivision or portion being altered. RCW 58.17.215. Appellants argue, without any evidence in the record, that the Anderson Short Plat alters the entire subdivision by increasing impacts on roads,

improvements and common areas (like the tideland tract). Appellants' Opening Brief at 8. Yet, the section relied upon by Appellants only requires the signature of the majority of persons that have an interest in the portion being altered.

The only property being altered is Lot 2. Dale and Leta Anderson are the sole owners of Lot 2 and consent to the short plat. Appellants have no ownership interest in Anderson Lot. Even if the court concludes that the redivision of a platted lot constitutes a plat alteration, a majority of those with an interest in Lot 2 (the Andersons) have signed the application. Thus, any error was harmless and does not warrant reversal. RCW 36.70C.130(1)(a)

V. CONCLUSION

Appellants have not carried their burden of proof that the Hearing Examiner erred. The Legislature did not intend to subject the redivision of a lot that is consistent withal applicable zoning criteria to a majority of vote. Respondents respectfully request that the Court deny the appeal and affirm the Hearing Examiners decision.

DATED: June 11, 2012

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